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EXAMINER

YIGDALL, MICHAEL J

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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte LINEX TECHNOLOGIES, INC.
Patent Owner and Appellant

Appeal 2016-007605
Reexamination Control No. 90/013,418
United States Patent 6,493,377 B2
Technology Center 3900

Before JAMES T. MOORE, JOHN A. JEFFERY, and
JENNIFER L. McKEOWN, *Administrative Patent Judges*.

JEFFERY, *Administrative Patent Judge*.

DECISION ON REQUEST FOR REHEARING

Patent Owner requests rehearing of our decision dated September 21, 2016 (“Dec.”), where we affirmed the Examiner’s decision to reject claims 1–15, 22–29, and 32–37 in the above-identified *ex parte* reexamination. Request for Rehearing filed November 21, 2016 (“Req. Reh’g”). For the reasons noted below, we deny the request to modify our decision.

SUBSTANTIAL NEW QUESTION OF PATENTABILITY (SNQ)

In the Request, Patent Owner first contends that we misapprehended or overlooked the lack of an SNQ in this proceeding because, among other things, the claims, references, and evidence used by the Examiner are the same as those in the three previous reexaminations.¹ Req. Reh’g 1–13.

But as we noted in our decision, Appellant’s SNQ arguments were raised for the first time in the Reply Brief and are, therefore, deemed to be waived as untimely. Dec. 5–6. Under 37 C.F.R. § 41.41(b)(2), we do not consider any argument raised in the Reply Brief which (1) was not raised in the Appeal Brief, or (2) is not responsive to an argument raised in the Examiner’s Answer, unless good cause is shown—an exception that is inapplicable here. Therefore, Appellant’s SNQ arguments are improper for that reason alone.

To the extent that Appellant contends that the particular challenges to the Examiner’s SNQ determination raised in the Reply Brief and the Rehearing Request were also raised in the Appeal Brief to seasonably and particularly identify those issues as a basis for appeal to this Board, we disagree. As we noted on page 6 of our decision, the *Appeal Brief* does not

¹ These proceedings are cited on page 4 of our earlier decision.

contain a challenge to the Examiner's SNQ determination to raise timely that issue on appeal and, consequently, such a challenge raised *in the Reply Brief* is waived as untimely. *See* 37 C.F.R. § 41.41(b)(2). To the extent that Appellant contends that the citations to pages 15 and 37 of the Appeal Brief (Req. Reh'g 5–6) somehow raise the SNQ issue with particularity to specifically identify that issue as an independent basis for appeal, we disagree.

Nor has Appellant demonstrated compliance with MPEP § 2274(VI) which requires that Appellant request reconsideration of the SNQ issue before the Examiner before we can review that issue as noted on pages 6 and 7 of our decision. As we indicated, MPEP § 2274(VI) requires that a patent owner *first* request consideration before the Examiner, and *then* seek review of the Examiner's SNQ determination before the Board. To this end, MPEP § 2274(VI) requires a patent owner identify *in its Appeal Brief* the communication in which the owner first requested reconsideration of the SNQ before the Examiner. But that prerequisite was not met. Therefore, because Appellant fails to comply with the requirements of MPEP § 2274(VI), the SNQ issue is not before us for that additional reason—a point that we noted on pages 6 and 7 of our decision.

Nor would we be persuaded of error in the Examiner's SNQ determination for the reasons indicated on pages 7 and 8 of our decision even if the SNQ issue was before us—which it is not. Therefore, we are not persuaded that we misapprehended or overlooked the points raised by Appellant regarding the Examiner's SNQ determination.

THE OBVIOUSNESS REJECTION

We are likewise unpersuaded that we misapprehended or overlooked the points raised by Appellant in connection with the Examiner's obviousness rejection of claim 1 over Ricochet, Young, Kahn, and Pursley 2² for the reasons indicated on pages 9 to 14 of our decision. As we noted in our issue statement on page 9 of the decision, our determination of whether the Examiner erred in rejecting claim 1 as obvious over the cited references turned on two issues, namely, whether (1) the cited prior art would have taught or suggested that each fixed node includes plural spread-spectrum transceivers ("the plural transceiver limitation"), and (2) the references were properly combinable.

We find unavailing Appellant's contention that we allegedly overlooked limitations other than the plural transceiver limitation, namely, the limitations labeled as "Limitations 2 and 3" on pages 38 to 41 of Appellant's Request. Although Appellant contends that we ostensibly overlooked the material pertaining to accessing and selecting a first fixed node on page 29 of "Appellant's Brief" (Req. Reh'g 38) no such material is found on page 29 of the Appeal Brief. Nevertheless, to the extent that Appellant intends to refer to page 29 of the Reply Brief in connection with this allegedly-overlooked material in "Appellant's Brief," such an argument raised for the first time on appeal in the Reply Brief is waived as untimely as we noted on pages 9 and 10 of our decision. We reach the same conclusion regarding the various references to pages 29 to 33 of "Appellant's Brief" on

² These references are cited in full on pages 4 and 5 of our decision and are omitted here for brevity.

pages 42 and 43 of the Rehearing Request, for here again, the cited material does not appear in the Appeal Brief, but rather the Reply Brief.

Appellant's additional citations to various documents submitted during prosecution and reference to the Reply Brief in connection with the allegedly-overlooked "Limitations 2 and 3" (Req. Reh'g 41–52, 54–56) are likewise unavailing, for these particular arguments were not made in the Appeal Brief to raise those arguments on appeal to this Board in a timely fashion. Although Appellant also refers to page 44 of the Appeal Brief in this regard (Req. Reh'g 52–54), Appellant nevertheless fails to show that arguments based on the allegedly-overlooked "Limitations 2 and 3" were timely raised in the Appeal Brief.

Appellant's arguments regarding the alleged non-enablement of the cited references (Req. Reh'g 13–17, 22–23) are likewise unavailing. As we noted on page 11 of our decision, even assuming, without deciding, that Young does not enable any disclosed embodiment using multiple transmitters as Appellant contends (Req. Reh'g 22; Reply Br. 17–19), that alone is not dispositive, for it is well settled that published subject matter is prior art for all that it teaches in *obviousness* determinations—even if the reference itself is not enabling. *See In re Antor Media Corp.*, 689 F.3d 1282, 1292 (Fed. Cir. 2012) (citing *Symbol Techs. Inc. v. Opticon Inc.*, 935 F.2d 1569, 1578 (Fed. Cir. 1991)).

We emphasize obviousness determinations here, for although non-enabled references cannot *anticipate* a claimed invention, they nevertheless may be considered in *obviousness* determinations, as is the case here. *See Symbol Techs.*, 935 F.2d at 1578 ("While a reference must enable someone to practice the invention in order to anticipate under § 102(b), a non-

enabling reference may qualify as prior art for the purpose of determining obviousness under § 103.”). Therefore, Appellant’s arguments regarding the cited references’ alleged non-enablement (Req. Reh’g 13–17, 22–23) are more germane to anticipation—not obviousness. *See, e.g.*, Req. Reh’g 15 (arguing that “the *anticipation* exercise must assess the enabling nature of a prior art reference in light of the proposed claims” (emphasis added)); *see also id.* at 17 (same for the Examiner’s *anticipation* analysis).

Nevertheless, as we noted in our decision, a prior art reference’s teachings are not considered in a vacuum, but rather considered together with the knowledge of ordinarily skilled artisans. *See In re Paulsen*, 30 F.3d 1475, 1480–81 (Fed. Cir. 1994). Cited references, then, do not have to explain every detail to render a claimed invention obvious since the reference speaks to those skilled in the art. *Id.* at 1480.

Therefore, as we explained in our decision, we found no error in the Examiner’s reliance on Young for the limited purpose for which it was cited, namely, that radios containing multiple transceivers were known in the art, and that providing multiple transceivers in lieu of a single transceiver in each of Ricochet’s fixed nodes would have been obvious to, among other things, increase the number of channels—a predictable result. Dec. 12 (citing Ans. 4–5).

Although Appellant contends that doubling the number of transceivers at each node would correspondingly decrease channel bandwidth and, thus, reduce each transceiver’s data rate by one-half (*see* Req. Reh’g 24–37), Appellant provides no persuasive evidence on this record to substantiate this theory apart from attorney argument which has little probative value. *See In re Geisler*, 116 F.3d 1465, 1470 (Fed. Cir. 1997). Nevertheless, even

assuming, without deciding, that providing multiple transceivers at a node as the Examiner proposes would reduce the bandwidth for each transceiver and its associated data rate as Appellant contends (Req. Reh'g 37), the disadvantages of such a data-rate reduction may well be offset by the advantages realized with multiple node-based transceivers including, among other things, transceiver diversity and potential backup capabilities. Such considerations amount to engineering trade-offs well within the level of ordinarily skilled artisans.

In any event, as we noted in our decision, the Examiner does not propose to physically combine Ricochet's nodes with those of Young, but rather merely relies on Young for a limited purpose, namely, to show that radios containing multiple transceivers were known in the art, and that providing known multi-transceiver radios in Ricochet's spread-spectrum system would have been obvious. Dec. 13 (citing Ans. 4–5).

It is well settled that “a determination of obviousness based on teachings from multiple references does not require an actual, physical substitution of elements.” *In re Mouttet*, 686 F.3d 1322, 1332 (Fed. Cir. 2012) (citations omitted). Nor is the test for obviousness whether a secondary reference's features can be bodily incorporated into the structure of the primary reference. *In re Keller*, 642 F.2d 413, 425 (CCPA 1981). Rather, the test is what the combined teachings of the references would have suggested to those of ordinary skill in the art. *Id.* And here, as we indicated on page 13 of our decision, the Examiner's proposed combination predictably uses prior art elements according to their established functions to yield a predictable result. *See KSR Int'l Co. v. Teleflex, Inc.*, 550 U.S. 398, 417 (2007).

Lastly, despite Appellant's arguments to the contrary (Req. Reh'g 30–35), and as we indicated on pages 13 and 14 of our decision, we see no error in the Examiner's findings that the cited references constitute analogous art. Prior art is analogous if it is (1) from the same field of endeavor as that of Appellant's invention regardless of the problem addressed, or (2) reasonably pertinent to the particular problem with which the inventor is involved. *In re Bigio*, 381 F.3d 1320, 1325 (Fed. Cir. 2004).

As we noted in our decision, the Examiner finds that the cited references are in the same field of endeavor, because each cited reference relates to (1) wireless communication in a distributed network of nodes, and (2) transmission of packets over the network. Dec. 13–14 (citing Ans. 5–7). The Examiner also finds that the cited references are reasonably pertinent to Appellant's problems pertaining to (1) reducing power levels; (2) increasing network capacity; and (3) creating a flexible and dynamically adaptable network. Dec. 14 (citing Ans. 7–10). For the reasons indicated in our decision and by the Examiner (Ans. 5–10), we are unpersuaded of error in these findings and conclusions. Accordingly, we are not persuaded that we misapprehended or overlooked those points in rendering our decision.

CONCLUSION

For the foregoing reasons, we have granted Appellant's request to the extent that we have reconsidered our decision of September 21, 2016, but we deny the request with respect to making any changes therein.

DENIED

Appeal 2016-007605
Reexamination Control No. 90/013,418
Patent US 6,493,377 B2

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